**DATO' KAM WOON WAH & ORS** *a*

**v.**

**MOHD ABDUL JALIL SARIP & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR *b*
JAMES FOONG J
[CIVIL SUIT: S2-22-249-1997]
17 OCTOBER 1997

***CIVIL PROCEDURE:*** *Injunction - Mareva Injunction - Whether applicable to defamation action - Whether solid evidence required that defendants would dissipate assets - Whether could be granted when defence of justification pleaded - whether contrary to consent judgment if granted.* *c*

The plaintiffs had brought an action for defamation against the defendants on account of a letter that was written by the defendants. The defendants had pleaded justification as their defence. Simultaneous to the action of libel the plaintiffs applied for a Mareva injunction to restrain the defendants from removing any of the defendants' assets. The defendants argued that a Mareva injunction was not applicable to a defamation suit and since justification was pleaded as a defence, a Mareva injunction which was interlocutory in nature, could not be granted. It was contended by the plaintiffs that the defendants had no other assets except the proceeds which they would receive from the sale of the land which both parties shared. The defendants submitted that there was no solid evidence that they had no other assets and further raised the issue that the court had no jurisdiction to grant a Mareva injunction that may be contrary to the consent order granted by a court of concurrent jurisdiction. *d* *e* *f*

**Held:**

**[1]** The question of financial stability ought not to affect the position in regard to what is the essential justice of the case as between the parties. The fact of financial ability cannot outweigh the more fundamental consideration that justice ought to be done and the relief in the form of a Mareva injunction should be extended to all kinds of cases be that of contract, personal injury or defamation. *g*

**[2]** When the importance of leaving free speech unfettered is placed on such a high pedestal, where even the well accepted principle of an interim injunction as disposed in the *American Cyanamid* case is inapplicable in a suit concerning defamation; where justification, fair comment or qualified privilege without malice is pleaded as a defence, that priority must similarly be accepted in the consideration of a Mareva injunction *h* *i*

concerning a defamation case where the same defences are pleaded. Since the test in the *American Cyanamid* case is no longer applicable in a defamation case of the nature as explained, the first condition laid down in *Ninemia* case for a Mareva injunction must be varied, in cases of that nature, to that of: 'where the statement is obviously untruthful or where the plaintiff has satisfied the court that the defence will fail'.That would be logical, as otherwise, it would become easier to secure a Mareva Injunction against the property of the defendants before judgment than to obtain an interim injunction to restrain publication of alleged defamatory material before trial, considering the fact that in both these applications the question of whether there is defamation or no defamation can only be determined at trial.

**[2a]** There was no other evidence to support the plaintiffs' contention that the defendants' defence of justification would fail. There was also no apparent proof that the alleged defamatory statement was untrue. Therefore the plaintiffs had failed to fulfill the first condition in their application for a Mareva injunction.

**[2b]** The claim by the plaintiff that the probity of the defendants were suspected, based on an allegation, which was the subject matter of a pending suit, could not be accepted as solid evidence that the defendants would dissipate or diminish their assets or money.

**[3]** There was no connection between the effect in the granting of a Mareva injunction and the consent order, as each claim stood independently on its own. The court would therefore not rule on that issue.

*[Plaintiffs' application dismissed with costs.]*

**Cases referred to:**

*Allen & Ors v. Jambo Holdings Ltd & Ors [1980] 2 All ER 502* ***(foll)***
*American Cyanamid v. Ethicon Ltd [1975] AC 396* ***(refd)***
*Bonnard v. Perryman [1891] 2 Ch 259* ***(foll)***
*Herbage v. Pressdram Ltd [1984] 2 All ER 769* ***(cit)***
*Lawrence Kwek v. Lim Han Yong [1989] 3 MLJ 210* ***(cit)***
*Lee Kuan Yew v. Tang Liang Hong & Other Actions (No 1) [1997] 2 SLR* ***(not foll)***
*New Straits Times Press (M) Bhd v. Airasia Bhd [1987] 1 MLJ 36* ***(foll)***
*Ninemia Maritime Corp v. Trare Schiffahrtsquesellshaft mbH & Co KG [1984] 1 All ER 398* ***(refd)***
*S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228* ***(not foll)***

*For the plaintiffs - Joseph Yeo; M/s AJ Ariffin, Yeo & Harpal*
*For the defendants - V Ramanathan; M/s Rama Velu & Assoc*

*Reported by Eugene Ong*

**JUDGMENT**

**James Foong J:**

On 20 March 1997 the defendants wrote a letter (the Letter) to the Honourable Judicial Commissioner, Dato' Kamalanathan Ratnam. It referred to a case where the learned Judicial Commissioner had recorded a consent order (Consent Order) between the parties. The parties there were the plaintiffs and the defendants respectively in this present suit, except in the reverse role. The letter explained of various arbitrary and unlawful acts taken by the plaintiffs in an attempt to dispose of a piece of landed property (the Land) which the parties shared. This, the defendants claimed were inconsistent with the terms of the Consent Order. Based on this letter, the plaintiffs, who are all partners of a legal firm known as M/s Kam Woon Wah & Partners, charged the defendants for libel. They, thus, brought this action for defamation against the defendants. The defences pleaded by the defendants are: justification and fair comment. Though not expressly stated, they also claimed qualified privilege.

Simultaneous to the filing of the writ of summons and statement of claim in this case the plaintiffs also applied, by way of summons-in-chambers, for a Mareva injunction. It is to restrain the defendants "from removing from the jurisdiction of this court any of the defendants' assets, in particular the proceeds which they will receive from the sale of the Land."

From the affidavits of the parties, I gathered that the defendants had taken control over the disposal of the Land from the plaintiffs. The defendants are now in the course of completing the sale of the Land for a consideration of RM20 million. Out of this, the defendants will stand to entitle a substantial portion. Assessing the defendants to have no other assets besides their entitlement to the Land or the proceeds therefrom, and verily believing that the defendants will take steps to dissipate or diminish their portion of the proceeds of sale, the plaintiffs are seeking this Mareva injunction to secure satisfaction on damages, if they succeed in this defamation suit against the defendants.

Determined that the plaintiffs must not succeed in this application for Mareva injunction, the defendants raised the following defences:

(1) A Mareva injunction is not applicable to a defamation suit;

(2) As justification is pleaded as a defence in this defamation suit, this application for a Mareva injunction, which is of an interlocutory nature, cannot be granted;

(3) No solid evidence is adduced to support the contention that the defendants have no other assets or will be dissipating the assets which they will receive from the sale of the Land;

(4) This court has no jurisdiction to grant a Mareva injunction that may be contrary to the Consent Order issued by a court of concurrent jurisdiction.

On the first issue raised by the defendants, it is true that since the day Mareva injunction gained a foothold in the Common Law, the subject matter litigated was of a commercial nature. Can this then be applied to a case where the cause of action is one of defamation?

In 1980, the Court of Appeal in England, in the case of *Allen & Ors v. Jambo Holdings Ltd & Ors* [1980] 2 All ER 502, had the opportunity to encounter an application for a Mareva injunction where the claim was that of a personal injury arising out of the tort of negligence. By an unanimous decision of the court, the sphere of applicability of this relief was extended to such a claim. The rational for this extension is best summed up by Shaw LJ as follows:

> Counsel who has argued this appeal on behalf of the first and second defendants has not suggested that there is any real difference in principle between an action for personal injury such as this one and an action in respect of some mercantile transactions. What he has said is that one ought to look more cautiously at the situation because in commercial disputes it is usually the case that a plaintiff will be in a position to meet any potential liability under his undertaking to damages if he asked for a Mareva injunction and then loses the action. But, as Lord Denning MR has pointed out, question of financial stability ought not to affect the position in regard to what is the essential justice of the case as between the parties.

In my view, when the only reservation against the extension of a Mareva injunction in a personal injury case is one of solely financial ability then, by the same token, it must also be the same reason for other causes of action. But since this factor cannot outweigh the more fundamental consideration that justice ought to be done, as expounded in *Allen's* case, the relief in the form of a Mareva injunction should also be extended to all kinds of cases, be that: of contract, personal injury or defamation. By this, I find the defendants' first contention must fail; a Mareva injunction is applicable to cases where the cause of action is that of defamation.

On the second ground, the defendants based their argument by anology to the series of authorities which expressed that: the courts should be slow in granting an interlocutory injunction in a libel suit where the defendant pleads justification *(Lawrence Kwek v. Lim Han Yong)* [1989] 3 MLJ 210), fair comment *(New Straits Times Press (M) Bhd v. Airasia Bhd)* [1987] 1 MLJ 36, and qualified privilege with no malice (*Herbage v. Pressdram Ltd* [1984] 2 All ER 769. The leading exponent of this principle is the Federal Court decision of *New Straits Times Press (M) Bhd v. Airasia Bhd* [1987] 1 MLJ 36 where Abdul Hamid Ag LP (as he then was) has this to say:

> The court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the plaintiff has satisfied the court that the defence will fail. That was made clear by Denning MR in *Harakas v. Baltic Exchange*.

But as argued by the plaintiffs' counsel, these cases relied on are solely restricted to the restraint on publication of the alleged defamation; not an interlocutory injunction to restrain the disposal of assets for fear of receiving no monetary satisfaction on a claim for libel. He felt that these cases should be extinguished and the test to be applied must be that of Mustil J in *Ninemia Maritime Corporation v. Trare Schiffahrtsquesellshaft m.b.H & Co K G* [1984] 1 All ER 398, which is accepted by our Federal Court in *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 63, and is as follows:

> (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chance of success; (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg, that the defendants' previous actions show his probity is not to be relied upon or that the corporation structure of the defence infers that it is not to be relied upon, but were proof that the defence is incorporated abroad will not suffice; (3) In reaching its conclusion, the court should take into account the defendants' evidence as well as the plaintiffs'.

From the cases cited above, two distinctive sets of principles seem to emanate; both dealing with interlocutory injunction (though of a different nature), and on similar substantive subject matter – defamation. In the *New Straits Times* case, the courts are cautioned to "be slow in issuing interim injunction in a libel action" until it is clear that the alleged libel is untrue. The Federal Court in the pronouncement of this stance was much influenced by the authoritative passage of Lord Coleridge delivered in the case of *Bonnard v. Perryman* [1891] 2 Ch. 259 @ 284. It is as follows:

> The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment. So long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, MR in *Coulson v. Coulson*:
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> > To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable'.
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> Compare this then to the first condition as set out by Mustil J in *Ninemia* case. There it only requires the plaintiff to "show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chances of success.

The fundamental difference between these two propositions, to my mind, is on the standard of proof. In an application for an interim injunction to restrain publication of defamatory material, a higher standard of proof seems to be required as compared to that of an application for a Mareva injunction to restrain a defendant from disposing or dissipating his assets before judgment in a defamatory suit. In the former, even the well settled principle enunciated in the *American Cyanamid v. Ethicon Ltd* [1975] AC 396 which governs the granting or refusal of an interim injunction is not applicable. This is explicitly confirmed in the *New Straits Times* case by:

> In accordance with the long established practice in defamation action, the principles enunciated by the House of Lords in the *American Cyanamid v. Ethicon Ltd* relating to interim injunctions are not applicable in action for defamation *(Herbage v. Pressdram Ltd).*

And the underlying objective to this deviation is:

> ... by reason of the fact that the question of libel are eminently matters to be decided on the facts at the trial and there is also the question of the proper meaning to be assigned to the words in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with

> free speech. Indeed it is because of the importance of leaving free speech unfettered that the court must be slow in issuing interim injunction in a libel action. – Abdul Hamid Ag LP in the *New Straits Times* case.

When the importance of leaving free speech unfettered is placed on such a high pedestal, where even the well accepted principle for consideration of an interim injunction as disposed in the *American Cyanamid* case is inapplicable in a suit concerning defamation where justification, fair comment or qualified privilege without malice is pleaded as a defence, I am of the view that this priority must similarly be accepted in the consideration of a Mareva injunction concerning a defamation case where the same defences are insisted upon. Since the test in the *American Cyanamid* case which involves the determination of whether "the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial" is no longer applicable in a defamation case of a nature explained above, the first condition laid down in *Ninemia* case for a Mareva injunction must also be varied in cases of this nature. The test must thus be altered to that of: "where the statement is obviously untruthful or where the plaintiff has satisfied the court that the defence will fail"; in line and correspond to that expounded in the *New Straits Times* case. This is logical; otherwise, it becomes easier to secure a Mareva injunction against the property of the defendants before judgment than to obtain an interim injunction to restrain publication of alleged defamatory material before trial, considering the fact that in both these applications the question of whether there is defamation or no defamation can only be determined at trial.

The very recent Singapore case of *Lee Kuan Yew v. Tang Liang Hong & Other Actions (No. 1)* [1997] 2 SLR was brought to my attention by learned counsel for the plaintiffs. In this case, a Mareva injunction was granted against the defendant on a defamation suit brought by the plaintiff. The learned judge (at p. 824 para. 6 of the report) applied the conventional approach of:

> Courts have required applicants for Mareva injunctions to show, inter alia, that they have a good arguable claim or there are serious questions to be tried and, further, they have to prove by 'solid evidence' that there is a real risk of a defendant dissipating his assets, here and abroad, before a judgment or award is satisfied.

I am of the view that this particular issue on the differences in application of legal principles in defamation suits on interim injunctions, Mareva or otherwise, may not have been canvassed before this distinguished and respected judge. This deprivation may have been caused by the absence of legal representation for the defendants, as the law report indicates that only counsel for the plaintiffs appeared. For this, I am not inclined to be influenced by this authority.

Having established the principle to be applied, I find that except for the mere allegation by the plaintiffs in their affidavit that the said Letter alleging defamation is untrue no other evidence were tendered to explain why they are false. I also find no traces in the plaintiffs' affidavit to support a contention that the defendants' defences will fail. Without any apparent proof that the alleged defamatory statement is obviously untrue, or being satisfied that the defendants' defences will fail, the plaintiffs have failed to fulfill their first condition in their quest for this Mareva injunction.

I now move on to the second condition which needs to be satisfied before a Mareva injunction can be granted. For this, the plaintiffs must adduce solid evidence to support their contention that the defendants have no other assets, or will be dissipating their only asset, which is the proceeds of the sale of the said Land, immediately upon receipt of the same.

Upon perusal of the plaintiffs' affidavit filed in support of this application I find only two paragraphs devoted to this significant aspect. In the first, the deponent of the affidavit – the 5th plaintiff, who was also authorised to make this affidavit on behalf of other plaintiffs, affirmed that the defendants "verily believe that in the event the said Land is disposed of, the defendants will take steps to dissipate or diminish the proceeds thereof and any judgment which the other plaintiffs and I may obtain against them will be left unsatisfied." He contended that this belief is based on the conduct of the defendants whom he alleged did not comply with the Consent Order to surrender the title of the said Land to the plaintiffs' as solicitors during the tussle as to which of the two parties who shared this Land had the right to sell the same. As for the second paragraph, this plaintiff verified that he: "verily believes that the defendants will take steps to dissipate or diminish their assets or money to avoid paying any damages which the other plaintiffs herein and I (he) may obtain against them in this proceedings."

Such statements are only allegations. They are not solid evidence backed by a finding of a court that what the defendants did was unjustified and unlawful. The claim that the defendants had failed to comply with the terms of the Consent Order to surrender the title to the said Land is in fact an issue in a pending suit between the parties. As this case has yet to be decided, the claim by the plaintiffs that the probity of the defendants are suspected based on this allegation cannot be accepted; the finding by the court may turn out that what the defendants did was justify and not in breach of the Consent Order. Such an inconclusive allegation certainly does not fall within the category of "solid evidence".

As for the last point raised by the defendants I find no connection between the effect in the granting of a Mareva injunction to the Consent Order. Each claim stands independently on its own, and I cannot comprehend how it can affect the other. For this, there is no necessity for me to entertain this issue further.

As the plaintiffs have failed to satisfy the court on the conditions as laid down above, I accordingly order this plaintiffs' application in encl. 3 to be dismissed with costs.